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9 DEL MAR DATATRAC, INC. and
10 FISERV, INC.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 AMERICAN RESIDENTIAL EQUITIES,
12 LLC,

13 Plaintiff,

14 vs.

15 DEL MAR DATATRAC, INC and
16 FISERV, INC.,

17 Defendants.

No.: 08-cv-00545-BEN (POR)

Assigned to The Honorable Roger
Benitez

**NOTICE OF MOTION AND
PARTIAL MOTION TO DISMISS
COMPLAINT PURSUANT TO
FEDERAL RULE OF CIVIL
PROCEDURE 12(B)(6)**

[Filed Concurrently With Memorandum
Of Points And Authorities In Support Of
Partial Motion To Dismiss]

Date: June 23, 2008
Time: 10:30 a.m.
Courtroom: 3

Venue Transferred: March 24, 2008

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 23, 2008, at 10:30 a.m., or as
 3 soon thereafter as counsel may be heard, in Courtroom 3, of the Honorable Roger
 4 Benitez, 880 Front Street, San Diego, California 92101-8900, defendants Del Mar
 5 Datatrac, Inc., and Fiserv, Inc., (respectively, "Del Mar" and "Fiserv," and
 6 collectively, "Defendants") will and hereby move the Court pursuant to Federal Rule
 7 of Civil Procedure 12(b)(6) for an order dismissing plaintiff American Residential
 8 Equities, LLC's ("Plaintiff") entire Complaint as against Fiserv and Plaintiff's Causes
 9 of Action for Fraud in the Inducement, Negligent Misrepresentation, and Florida's
 10 Deceptive and Unfair Trade Practices Act ("FDUTPA") as against Fiserv, all on the
 11 following grounds:

- 12
- 13 • Plaintiff's entire Complaint as against Fiserv should be dismissed on the
- 14 grounds that it fails to state a claim because Fiserv cannot be held
- 15 responsible for the actions of its alleged subsidiary Del Mar solely on the
- 16 basis of its alleged status as a parent / shareholder.
- 17
- 18 • Plaintiff's First, Second, and Fifth Causes of Action, for Fraud in the
- 19 Inducement, Negligent Misrepresentation, and violation of the FDUTPA,
- 20 all tort causes of actions, fail to state a claim because Plaintiff only
- 21 alleges a breach of contract and such allegations do not support tort
- 22 claims under the economic loss rule.¹
- 23
- 24 • Plaintiff's First and Second Causes of Action for Fraud in the
- 25 Inducement and Negligent Misrepresentation are not pleaded with
- 26

27 ¹ The Fifth Cause of Action, for violation of the FDUTPA, is misnumbered in the Complaint.

28

1 sufficient particularity Under Rule 9(b) of the Federal Rules of Civil
2 Procedure.

- 3
- 4 • Plaintiff's Fifth Cause of Action for violation of the FDUTPA is barred
5 by the choice of law provision in the parties' contract, which elects
6 remedies exclusively under California law.
- 7

8 This Motion is and will be based on this Notice of Motion, the accompanying
9 Memorandum of Points and Authorities, the court records and files, and upon such
10 other evidence and argument that may be offered at the hearing on the Motion.

11

12 DATED: April 28, 2008

REED SMITH LLP

13

14 By s/ Christopher O. Rivas
15 Christopher O. Rivas
16 Attorneys for Defendants
17 DEL MAR DATATRAC, INC,
18 AND FISERV, INC.
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PROOF OF SERVICE


I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On April 28, 2008, I served the following document(s) by the method indicated below:

***NOTICE OF MOTION AND PARTIAL MOTION TO DISMISS COMPLAINT
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)***

- ☐ by transmitting via facsimile on this date from fax number 213.457.8080 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 p.m. and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing.
- ☒ by causing the document(s) listed above to be placed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service (*via UPS*) for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.
- ☐ by transmitting via e-mail to the parties at the email addresses listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on April 28, 2008, at Los Angeles, California.


Arthur Escalante

SERVICE LIST

American Residential Equities, LLC,
v.
Del Mar DataTrac, Inc. and FISERV, Inc.
Case No. 08-cv-00545-BEN (POR)

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